

State of California
Department of Insurance
45 Fremont Street, 21st Floor
San Francisco, California 94105

FINAL STATEMENT OF REASONS

**File No. RH-398
November 16, 2001**

PUBLIC INSPECTION AND PUBLICATION OF EXAMINATIONS

NO CHANGES HAVE BEEN MADE TO THE TEXT.

NO MATERIAL OTHER THAN THAT PRESENTED IN THE INITIAL STATEMENT OF REASONS HAS BEEN RELIED UPON BY THE DEPARTMENT OF INSURANCE.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The Department has made a determination that adoption, amendment or repeal of the regulation does not impose a mandate on local agencies or school districts. The regulation has nothing to do with local agencies or school districts; it neither requires nor prohibits action on their part.

SUMMARY AND RESPONSE TO OBJECTIONS OR RECOMMENDATIONS

[Note: Pursuant to Gov. Code § 11346.9(b)(3), repetitive comments are aggregated and summarized as a group and responded to as a group; irrelevant comments are aggregated and summarized as a group and summarily dismissed as a group.]

Comment No. 1

Commentator: Douglas L. Hallett, Mercury Insurance Group

Date: July 2, 2001

Type of Comment: Written and Oral

Proposed California Code of Regulations, Title 10, Section 2695.30(a)(1):

Summary of Comment: The statutory citation should be Government Code section 11349(c).

Response to Comment: No change will be made in response to this comment. The commentator offers a correction of the first noticed text of ER-40, which was amended soon thereafter to change the citation, among other changes. ER-40, or OAL File No. 01-1005-02 EE, comprising the emergency regulations for Public Inspection and Publication of Examinations, is now in effect and will expire on February 9, 2002.

Section 2695.30(a)(5):

Summary of Comment: The first sentence should be modified as follows:

. . . shall be no longer than twenty (20) pages, or ten times the length of the adopted examination report to which the comments relate, including its appendices, exhibits or other supplemental documents, whichever is greater.

In the alternative, if “ten times” is not added to the sentence, the second suggested phrase – “including its appendices,” etc. -- should be added. Whichever alternative is chosen, the following sentence should be added at the end of the subsection:

To the extent, if any, reproduction of a supplemental document in a format conforming to the specifications of this section requires additional pages, such additional pages shall be allowed.

The reasons for the above are:

- (1) the regulation is unnecessarily restrictive, since by the terms of its notice it has no fiscal impact;
- (2) the regulation is unduly restrictive, since inevitably a response to an allegation requires more space than the allegation itself due to the typically contracted format and summary nature of the Department of Insurance’s examination report, its conclusions set forth in the report with little or no factual back-up;
- (3) insurers are subject to privacy and confidentiality restrictions that requires not just redaction of identifying and privileged information, but also “masking” of comments to assure the information cannot be attributed to a given individual; and
- (4) due process and fairness concerns require that insurers be provided more space in which to respond, since the Department’s report is not subject to third-party review but the insurer is subjected to public scrutiny through publication of the report.

Response to Comment: No change will be made in response to this comment for the following reasons:

(1) Twenty (20) pages is the least amount of space an insurer would have in which to respond to an examination report. Historically, many reports have consisted of substantially more than twenty pages, thereby providing substantially more than twenty pages in which the insurer might respond. Moreover, not every finding in a report will require a response; some findings will be unassailable even by the subject insurer.

(2) The statement that “inevitably” the response must be longer than the report is unsupported. In fact, the proposed regulation’s limitation may provide needed incentive to insurers to be direct and concise.

(3) This reason has no merit. It is unlikely that the redaction and masking would lead to any result other than to shorten the comments.

(4) Finally, due process is well served by the requirement in Insurance Code section 12938, that the Commissioner publish the examined insurer’s comments (if any are submitted) with the

adopted report of examination. In its preliminary form, the report is subjected to the scrutiny of the examined insurer, whose response -- unlimited in form or length -- is sought by the Department pursuant to Insurance Code section 734.1(a). The report and the response then are reviewed by the Commissioner before he determines whether to adopt, modify, correct or reject the report.

Re: Section 2695.30(a)(6) (proposed by commentator):

Summary of Comment: A new subsection, §2695.30(a)(6), should be added, as follows:

As part of its comments, an examined insurer may direct viewers to an address or website where additional information about the examined insurer's practices may be obtained.

Response to Comment: No change will be made in response to this comment. There is nothing in the proposed regulations that prohibits an examined insurer from directing the reader to additional information. The requested addition of section 2695.30(a)(6) is thus unnecessary.

Comment No. 2

Commentator: G. Diane Colborn, Personal Insurance Federation

Date: July 2, 2001

Type of Comment: Written

Section 2695.30(a)(5)

Summary of Comment: This subsection arbitrarily limits the number of pages of an insurer's comments, thereby exceeding the scope of authority granted by Insurance Code section 12938(b)(2). That subsection, while giving the Commissioner authority to adopt form and length standards for the comments, does not give authority to establish an arbitrary limit on the number of pages or a limit that does not provide the insurer with a meaningful opportunity to respond, per the discussion during legislative debates on the bill. Moreover, the Commissioner has "identified no necessity" for the limitation. The proposed regulation, therefore, violates the "necessity," "authority" and "consistency" standards of Government Code section 11349.1(a), and the constraints of due process.

Response to Comment: No change will be made in response to this comment. The Legislature delegated authority to the Commissioner to regulate the form and length of insurers' comments. We interpret that grant of authority as a legislative declaration that the published comments be direct, concise and understandable. These are the overriding factors with which the proposed standards were drafted. Also, see response to Comment No. 1, above.

Comment No. 3

Commentator: N. Douglas Martin, Jr., Fireman's Fund

Date: July 5, 2001

Type of Comment: Written

Section 2695.30(a)(5)

Summary of Comment: The length prescribed by the proposed regulations is too short. Insurers' responses often are fact specific and complex, requiring more than the limited number of pages permitted, especially if that limited number must include supporting documentation.

Repetitive Comment:

Commentator: Samuel Sorich, National Association of Independent Insurers (NAII)

Date: July 5, 2001

Type of Comment: Written and Oral

Response to Comment: No change will be made in response to this comment. Please see responses to Comments 1 and 2.

Summary of Comment: In the alternative, the regulation should be amended to include the following sentence:

The examined insurer may request[,] in writing, relief from this comment length page limitation. The Commissioner shall consider and may grant a reasonable expansion of the page limit in this subsection.

Repetitive Comment:

Commentator: Samuel Sorich, National Association of Independent Insurers (NAII)

Date: July 5, 2001

Type of Comment: Written

Response to Comment: No change will be made in response to this comment. The statute does not require the Commissioner to establish another set of standards under which a permissive grant of expansion would occur. Moreover, the Commissioner does not see the necessity for a length waiver provision when an insurer has its own webpage on which it may post an additional response. Please see the third Response to Comment No. 1, above.

Comment No. 4

Commentator: Samuel Sorich, National Association of Independent Insurers (NAII)

Date: July 5, 2001

Type of Comment: Written

Section 2695.30(a)(1):

Summary of Comment: In requiring the comments to be in "Plain English," the Commissioner is restricting the content, not the form or length, of the comments. He has no authority to do so. The mandate to limit comments to "Plain English" inhibits the expression of ideas in a manner "inconsistent with the Legislature's directive that an insurer has a right to make its views known to the public."

Response to Comment: No change will be made in response to this comment. "Plain English" goes to form, not content. It is not the ideas the Commissioner is regulating, it is the form in which the ideas are presented, with an eye toward the public's ability to easily understand the

ideas. If an insurer is not concerned with having the public understand its ideas, there is little point to its submitting comments for publication.

Summary of Comment: The mandate to limit comments to “Plain English” inhibits the expression of ideas in a manner “inconsistent with the Legislature’s directive that an insurer has a right to make its views known to the public.”

Response to Comment: No change will be made in response to this comment. All of Senate Bill 1805’s “directives” are for the Commissioner, with the exception that the insurer’s comments “shall” be regulated as to form and length. A page limit does not inhibit the expression of ideas, just the manner in which they are presented.

Summary of Comment: The proposed regulation’s description of “Plain English” leaves it to the Department to judge what is “easily understood” and who “the public” is. This invites arbitrary and inconsistent decisions and creates the potential for unwarranted limitations on the expression of the opinions of examined insurers.

Response to Comment: No change will be made in response to this comment. It is axiomatic that the Commissioner has reasonable discretion in interpreting the laws under which he is authorized to regulate the insurance industry. The standard used by the Commissioner in determining whether comments are in “Plain English” will be objective: Would these comments be easily understood by a reasonable member of the public who has little or no experience with insurance?

Summary of Comment: The phrase “easily understood by the public” means easily understood by a person with no more than “some basic proficiency in English.” Because examination reports are often technical and legally complicated, adequate comments in basic English would be impossible to make. Moreover, the “basic English standard” in the proposed regulation is “inconsistent with the Legislature’s intent that the public should be able to view insurers’ opinions on examination reports so that the public can make fully informed judgments.”

Response to Comment: No change will be made in response to this comment. The comment underestimates the ability of members of the public to understand Plain English. As to the Legislature’s intent, that intent is reflected in the regulations’ requirement that the insurer’s comments be direct, concise and understandable.

Summary of Comment: There is no necessity to restrict the insurer’s comments to “Plain English.” It is in an insurer’s best interest to express its views in simple, straightforward language so the public understands the insurer’s position. To do otherwise would be to waste the opportunity given insurers by the Legislature. The Department need not protect an insurer from itself by requiring “Plain English.”

Response to Comment: No change will be made in response to the comment. If the necessity did not exist, the commentator would not have posed his earlier objections to using Plain English in an insurer’s comments. (“The mandate to limit comments to “Plain English” inhibits the

expression of ideas” “Because examination reports are often technical and legally complicated, adequate comments in basic English would be impossible to make”)

Summary of Comment: It is unfair to require “Plain English” of insurers’ comments and not to require the same of the Department’s examination reports. The Department will be at an advantage with the freedom to use “technical language and sophisticated legal concepts.”

Response to Comment: No change will be made in response to the comment. The Department and the insurers are not engaged in a competition. The Department, as the regulator, examines insurers’ books and records, and reports its findings. The Legislature has instructed the Department to share its findings regarding claims handling – the reports -- with the public. The Legislature has expressed its clear intent that all regulations promulgated by all state agencies be written in “Plain English” so that the parties to be affected by the regulations – licensees and the public -- can easily understand them. (Gov. Code §§11342.580, 11349.) No lesser standard should be applied to the published examination reports.

Section 2695.30(a)(5):

Summary of Comment: This subsection requires that appendices, exhibits and other supplemental documents conform to the specifications set forth in other subsections of the proposed regulations as to typeface, color, spacing and margin. This is impractical and unduly restrictive, in that it would prevent an insurer from using documents that do not conform, such as charts, tables, graphs, court decisions, and journal articles.

Response to Comment: No change will be made in response to the comment. Documents that do not conform may be located at another source to which the insurer may direct the reader in its comments. Because the accuracy of scanned documents is unreliable, the Department cannot be placed in the position of having to reproduce on its website any nonconforming documents attached to insurers’ comments. To ensure accuracy, the Department would have to have nonconforming documents retyped, thereby causing a fiscal impact to the Department.

Comment No. 5

Commentator: Peter M. Gorman, Alliance of American Insurers (AAI)

Date: July 5, 2001

Type of Comment: Oral

Section 2695.30(a)(1):

Summary of Comment: The “Plain English” requirement is somewhat puzzling and troublesome to our members; they are not sure exactly what that entails.

Response to Comment: No change will be made in response to the comment. The “Plain English” standard is an objective one, as stated above. Insurers will have to have the following question in mind while writing their comments, just as the Commissioner will in determining compliance with §2695.30(a)(1): Would these comments be easily understood by a reasonable member of the public who has little or no experience with insurance?

Comment No. 6

Commentator: Samuel Sorich, National Association of Independent Insurers (NAII)

Date: July 5, 2001

Type of Comment: Oral

Summary of Comment: A link [hyperlink¹] in the insurer's published comments, leading the reader to an outside website to read further comments and/or supplementary documents not conforming to the specifications in the proposed regulations, would address insurers' concerns as to the 20-page limitation.

Response to Comment: No change will be made in response to this comment. As stated above in response to Comment No. 1's proposed section 2695.30(a)(6), there is nothing in the proposed regulations that prohibits an examined insurer's directing the reader in the text of its comments to another location for further reading, whether that location is on the Internet or in the physical world.

Comment No. 7

Commentator: Alan Fisher, California Reinvestment Committee (a statewide coalition of more than 200 non-profit organizations working on community reinvestment issues)

Date: July 5, 2001

Type of Comment: Oral

Summary of Comment: The "Plain English" requirement is necessary so that consumers will not be barred from being able to understand what happens in the insurance industry. No one outside the industry understands industry jargon.

Response to Comment: No change will be made in response to this comment. The "Plain English" requirement will help to make the information more accessible to consumers, although it is no guarantee that industry jargon will not be present.

NO COMMENTS WERE SUBMITTED BY THE OFFICE OF SMALL BUSINESS ADVOCATE.

NO COMMENTS WERE SUBMITTED BY THE REGULATION REVIEW UNIT OF THE TRADE AND COMMERCE AGENCY.

¹ In searching the Internet for a definition of "hyperlink" (since Merriam-Webster was unhelpful), the following was found at <http://www.2020tech.com/def-hl.html>: "A hyperlink is a special area on a Web page which can be activated (usually with a mouse). The hyperlink can appear as text or graphics. Most hyperlinks take you to another Web page. Other hyperlinks perform special functions, such as sending email, submitting a form, accessing an ftp site, execut[ing] a database query, or access[ing] a Usenet newsgroup. Every browser has a function which backs up to the previous page Therefore, you can delve into the detail of a hyperlink and later return to the page that refer[r]ed you there." (Copyright © 1994-2001, 20/20 Technologies, 6980 NW 29th Way, Ft. Lauderdale, FL 33309.)

ALTERNATIVES

The Department has determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, or would be as effective and less burdensome to affected private persons than the adopted regulation. In support of this statement, no alternative was proposed, identified or brought to the attention of the agency during the public comment period. No proposed alternatives were rejected that would lessen the adverse economic impact on small businesses.